Supreme Court, U.S.
FILED
06-176 AUG 3 - 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

CNH AMERICA LLC,

Petitioner,

v.

GLADYS YOLTON, WILBUR MONTGOMERY, ELSIE TEAS, ROBERT BETKER, EDWARD MAYNARD, GARY HALSTED, AND EL PASO TENNESSEE PIPELINE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does federal labor law permit the judicial inference, set forth in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), but rejected by eight other Circuits, that a retiree's health care benefits are "vested," and thus must be fully funded without change by the employer for the rest of the retiree's life, merely because the collective bargaining agreement providing the benefits does not expressly limit their duration?

2. Does federal labor law permit a judicial determination that a successor company is the "alter ego" of its predecessor in a labor dispute, even though the transaction that created the successor explicitly allocated all pertinent liabilities to the predecessor's solvent parent, and in the absence of proof that the transaction creating the successor was fraudulent or undertaken to evade the predecessor's federal labor law obligations?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The petitioner in this case is CNH America LLC ("CNH America"), which was a defendant in the district court and an appellant in the Sixth Circuit. The sole member of CNH America, with 100% ownership, is Case New Holland Inc., which in turn is wholly-owned by CNH Global N.V., a company that is publicly traded on the New York Stock Exchange.

CNH America understands that El Paso Tennessee Pipeline Company ("El Paso"), which also was a defendant in the district court and an appellant in the Sixth Circuit, may file a separate Petition for Writ of Certiorari in this matter on the "vesting" issue identified in the first Question Presented. Because CNH America asserted a cross-claim against El Paso regarding the "alter ego" issue identified in the second Question Presented, El Paso is a respondent with respect to that issue.

The principal respondents in this case are a class of former employees of the J.I. Case Company or Case Corporation who retired on or before July 1, 1994, and their surviving spouses, all of whom were plaintiffs in the district court and appellees in the Sixth Circuit. The class representative respondents, who were named plaintiffs and appellees below, are: Gladys Yolton, Wilbur Montgomery, Elsie Teas, Robert Betker, Edward Maynard, and Gary Halsted. Subsequent references herein to "respondents" are to these individuals, not El Paso.

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CNH America LLC ("CNH America") respectfully petitions this Court to grant a writ of certiorari to review a decision of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit is reported at 435 F.3d 571. Appendix to Petition ("Pet. App.") 1a. The decision of the United States District Court for the Eastern District of Michigan, entering a preliminary injunction against El Paso Tennessee Pipeline Company ("El Paso") is reported at 318 F. Supp. 2d 455. Pet. App. 44a. Later decisions of the district court applying the preliminary injunction to CNH America are unpublished but appended hereto. Pet. App. 78a, 90a.

JURISDICTION

The decision that is the subject of this Petition was entered on January 17, 2006, and CNH America's petition for rehearing en banc was denied on May 9, 2006. This Petition is timely filed. Sup. Ct. R. 13.1. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

This Court reviews non-final judgments, such as the Sixth Circuit's affirmance of the preliminary injunction below, when "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari . . . particularly if the lower court's decision is patently incorrect and the interlocutory decision, such as a preliminary injunction, will have immediate consequences for the petitioner." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 259 (8th ed. 2002). *See, e.g., Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (reviewing remand, based on a clearly erroneous interpretation of law, for entry of a preliminary injunction); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (reviewing affirmance of a preliminary injunction

because challenged ordinance raised important issues); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975) (reviewing reversal of summary judgment and remand for trial). Indeed, this Court has emphasized that "it would be intolerable to leave unanswered" an important legal issue pending trial because an "uneasy and unsettled" posture would harm similarly situated parties. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (reviewing reversal of summary judgment and remand for trial).

This case satisfies all of these criteria for review. Denial of the Petition would likely subject CNH America to a lengthy trial and, by letting stand the Sixth Circuit's erroneous decision, would also perpetuate conflicts among the Circuits on two issues of substantial importance to federal labor law: (1) the purported "vesting" of certain retiree health care benefits; and (2) the criteria for designating an employer an "alter ego" in a labor law dispute. Resolution of these issues by the Court now would prevent unnecessary litigation, correct errors made by the Sixth Circuit, and impose nationwide uniformity on two important issues.

This Court also reviews non-final orders by Courts of Appeals involving preliminary injunctions when the admission of further evidence at trial would *not* assist in the resolution of critical legal questions. *See, e.g., Ashcroft v. ACLU*, 542 U.S. 656 (2004) (reviewing decision affirming entry of preliminary injunction); *Saenz v. Roe*, 526 U.S. 489 (1999) (same).[1] Here, absent review by this Court, the district court would decide the merits based upon the decision of the Sixth Circuit, which approved the district

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[1] *Accord Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211, 1216 (2006) (reviewing decision affirming preliminary injunction); *McCreary v. ACLU*, 125 S. Ct. 2722, 2731-32 (2005) (same); *Miller v. French*, 530 U.S. 327, 334-35 (2000) (same).

court's earlier legal analysis. Accordingly, the admission of further evidence at trial would be unlikely to assist in the district court's resolution of the critical legal questions presented herein, and would delay their ultimate disposition.

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor-Management Relations Act ("LMRA") and Sections 502(a)(1)(B) and (a)(3) of the Employee Retirement Income Security Act ("ERISA") are reproduced in the Appendix, Pet. App. 96a.

STATEMENT OF THE CASE

The Sixth Circuit affirmed the entry of a preliminary injunction against CNH America. This injunction requires CNH America to pay, subject to indemnification by El Paso, approximately $1.8 million per month for health care benefits provided to labor union retirees and their surviving spouses. The judgment rests on two erroneous rulings that are in conflict with other Circuits.

First, the court applied an inference, created in *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984) ("*Yard-Man*"), that retiree health care benefits are "vested," and thus unchangeable and fully payable by the employer for the lifetime of the recipient, when the governing collective bargaining agreement ("CBA") is silent on the duration of the benefits. The Sixth Circuit based the inference on its conclusion that, because retiree benefits are "status benefits," they "carry with them an inference that they continue so long as the prerequisite status is maintained." 716 F.2d at 1482. Further, the court deemed the inference a "persuasive consideration[]" that outweighs "contrary implications" from the express terms of the CBA. *Id.* at 1482-83. The so-called "*Yard-Man* inference" has been rejected by eight other Circuits and adopted by only two. This conflict among the Circuits contravenes the federal policy that the realm of labor

negotiations and the interpretation of CBAs "is peculiarly one that calls for uniform law." *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962) (quotation marks omitted). The inference also frustrates the policy judgments underlying ERISA and the LMRA, erodes the certainty of CBAs, and promotes forum-shopping.

Second, the Sixth Circuit ruled that an employer may be deemed the "alter ego" of its predecessor, and thus be held liable for the predecessor's labor law obligations, even though the transaction creating the employer fully allocated all pertinent labor obligations to the predecessor's solvent parent, and was neither fraudulent nor intended to evade the obligations. Pet. App. 28a-30a. This judgment conflicts with the law of six other Circuits but comports with the law of four. It is also inconsistent with this Court's decisions bearing on alter ego analysis, which recognize the key factors of fraud and intent to evade liabilities, and which deem it unacceptable "to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims." *Howard Johnson Co. v. Detroit Local Jt. Exec. Bd., Hotel Emps.*, 417 U.S. 249, 256 (1974).

In addition to the conflict among the Circuits presented by both issues, each issue raises a matter of considerable national import. The escalating costs of retiree health care have forced several major corporations resident in the Sixth Circuit into bankruptcy or its brink.[2] The equally pervasive

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[2] *See, e.g.*, Terry Kosdrosky & John D. Stoll, *Delphi, Unions and GM Show Progress in Labor Negotiations*, Wall St. J., June 10, 2006, at A5 (describing Delphi's request for bankruptcy court to approve rescission of contracts with unions to reduce benefit costs); Lee Hawkins, Jr., et al., *Wielding the Ax*, Wall St. J., Oct. 18, 2005, at A1 (reporting on agreement between UAW and General Motors to cut retiree health care benefits, and citing experts' opinion that "GM might even be forced into bankruptcy by its mounting legacy costs").

issue of successor liability for labor obligations creates grave uncertainty in corporate transactions. For these reasons, review by this Court at this time is especially appropriate.

A. Historical Labor Relations Between the Parties.

Respondents are a class of retirees (and their surviving spouses) who worked for the J.I. Case Company ("J.I. Case") – which was later known as Case Corporation from January 23, 1990, through June 30, 1994 – and who retired on or before July 1, 1994. The retirees were members of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"). Their health and welfare benefits were spelled out through a series of CBAs governed by the LMRA and ERISA. Pet. App. 4a, 45a.

In the 1971 CBA, J.I. Case agreed to pay the premiums for some of its retirees' health care benefits. Pet. App. 47a. In the succeeding CBAs from 1974 to 1990, J.I. Case agreed to pay "the full premium cost of the [retirees'] coverages" for the duration of each CBA. Pet. App. 47a. Importantly, each CBA from 1971 to 1990 provided that the "group insurance plan," which encompassed retirees' covered health care benefits, ran concurrently (and *expired*) with each CBA. Pet. App. 4a.

The 1990 CBA expired at the end of October 2, 1993. Pet. App. 4a-5a. Rather than enter into a new long-term agreement, Case Corporation (formerly J.I. Case) and the UAW entered into an Extension Agreement, which extended most terms of the 1990 CBA through February 2, 1995. Pet. App. 5a. The parties included a letter of understanding – the so-called "Cap Letter" – among the terms of the Extension Agreement (Pet. App. 5a):

> This will confirm our understanding that the average per capita annual cost to the Company of providing medical and related benefits under the Case Group

> Benefit Plan to retired employees and surviving spouses of deceased employees shall not exceed $2,750 for Medicare eligible individuals and $8,500 for those individuals who are not eligible for Medicare. Notwithstanding the foregoing, no covered person shall be required to pay a portion of any excess amount prior to April 1, 1998.

In other words, the Cap Letter provided that, as of April 1, 1998, the retirees (and their surviving spouses) would be responsible for health insurance premiums in excess of $2,750 per Medicare-eligible recipient and $8,500 per non-Medicare recipient.

B. The Reorganization Agreement and Related Transactions.

In 1970, J.I. Case had become a wholly-owned subsidiary of Tenneco, Inc., and remained so after it became Case Corporation in 1990. Pet. App. 3a. On June 23, 1994, Tenneco underwent a reorganization, spinning off most of its agriculture and construction business assets, including most of those of Case Corporation. Pet. App. 3a. Tenneco sold these assets to Case Equipment Corporation ("Case Equipment"), a new subsidiary, in exchange for stock. Pet. App. 3a. On July 1, 1994, Tenneco changed the name of Case Equipment to Case Corporation and held an initial public offering of Case shares. Pet. App. 3a. At the same time, the former Case Corporation (which had been J.I. Case) changed its name to Tenneco Equipment Corporation. Pet. App. 29a. In a series of transactions, by November 1994, Tenneco had sold a majority of the new Case Corporation's stock to the public. In 1996, Tenneco merged with an El Paso Natural Gas Company subsidiary and became the El Paso Tennessee Pipeline Company. Pet. App. 3a-4a. In 2002, the new Case Corporation became a limited liability company and changed its name to Case, LLC. Pet. App. 46a. In 2004, Case, LLC, combined businesses with

New Holland North America and its name was changed to CNH America LLC. Pet. App. 91a n.1.

Under the Reorganization Agreement governing Tenneco's sale of assets, Tenneco retained its stock in J.I. Case, along with certain specified assets and liabilities. Pet. App. 3a. In the section on "Retained Liabilities" (§ 3.02(c)), the Reorganization Agreement expressly allocated to Tenneco: "the [J.I.] Case Liabilities for postretirement health and life insurance benefits (to the extent that [J.I.] Case is obligated on the Reorganization Date) of retirees of the [J.I.] Case Business in the United States and current employees of the [J.I.] Case Business in the United States who retire on or before July 1, 1994 and their dependents as more fully described in the Benefits Agreement." Pet. App. 6a. The Reorganization Agreement (§ 5.01) further provided that Tenneco would indemnify, defend, and hold Case Corporation harmless for any "Liabilities" arising out of Tenneco's failure to pay the "Retained Liabilities." Pet. App. 34a. A crucial aspect of this transaction is that certain existing liabilities of J.I. Case – and very substantial assets including all stock of the new subsidiary – were fully allocated to its *owner*, Tenneco, and were not spun off to the new subsidiary, which eventually became CNH America.

C. The Dispute.

After the 1994 reorganization, Tenneco (later El Paso) continued to administer and pay respondents' health care benefits. Pet. App. 7a. On October 27, 1997, El Paso informed respondents that, in accordance with the Cap Letter, they were required to contribute $56 each month in above-cap premiums, beginning April 1, 1998. Pet. App. 7a.

Although it had no legal obligation to do so, on November 5, 1997, the new Case Corporation informed respondents that it would pay the above-cap premiums through the end of 1998 as a show of "goodwill" to them and the UAW during ongoing collective bargaining negotiations.

Pet. App. 7a. Accordingly, in their 1998 negotiations, Case Corporation and the UAW established a Voluntary Employee Beneficiary Association ("VEBA") Trust of $27.8 million to fund these payments. Pet. App. 7a. The parties included a letter of understanding in the VEBA plan document, which plainly stated that "the VEBA is intended to complete Case's funding of the above cap costs and that Case will not be required to make any further contributions to the VEBA from its own funds." 6th Cir. J.A. 1191. When the VEBA Trust's funds were nearly exhausted in August 2002, El Paso informed respondents that their above-cap premiums had increased to $290 per month. In December 2002, this amount increased to $501. Pet. App. 8a.

On December 23, 2002, respondents filed suit against El Paso and CNH America in the United States District Court for the Eastern District of Michigan. The Complaint alleged violations of section 301(a) of the LMRA and sections 502(a)(1)(B) and 502(a)(3) of ERISA. Respondents sought damages for premiums already paid, a permanent injunction requiring payment of all their health care benefits for life, and a preliminary injunction to shield them from paying for their health care benefits pending trial. Pet. App. 3a, 8a, 44a.

D. The Decisions of the District Court.

On December 31, 2003, the district court preliminarily enjoined El Paso from requiring respondents who retired before the Cap Letter to pay the above-cap premium costs. Pet. App. 43a. The court required El Paso to bear these costs of roughly $1.8 million per month because Tenneco had assumed respondents' health care benefits in the Reorganization Agreement (§ 7.02(c)). Pet. App. 74a. The court also held CNH America secondarily liable in the event of El Paso's default. Pet. App. 74a-75a. In reaching its ruling, the court recited the "applicable law" of the Sixth Circuit, including the *Yard-Man* inference that retiree health

care benefits "vest" upon retirement if the CBA does not expressly state their duration. Pet. App. 57a-58a.

El Paso filed a motion for reconsideration, seeking to have CNH America alone pay for the above-cap costs, with the issue of indemnification by El Paso held until after trial. Pet. App. 24a. On March 9, 2004, the district court granted the motion because it had "overlook[ed] the fact that, as the signatory to the CBAs, [CNH America] retained liability for Plaintiffs' health care costs despite El Paso's subsequent assumption of those liabilities. . . ." Pet. App. 80a. Central to this order was a ruling that CNH America was the alter ego of J.I. Case, which had signed the CBAs. Pet. App. 84a-85a. The court denied CNH America's motion for reconsideration on June 3, 2004. Pet. App. 93a.

On September 3, 2004, the district court ruled (correctly) on summary judgment, based on Delaware law, that El Paso has a duty pursuant to the Reorganization Agreement to indemnify CNH America for the above-cap costs, beginning *after* the date of that decision. Nevertheless, CNH America remains primarily liable to advance the monthly above-cap costs, subject to indemnification by El Paso.

E. The Decision of the Sixth Circuit.

CNH America and El Paso both appealed to the Sixth Circuit, which, on January 17, 2006, affirmed each of the district court's rulings. Pet. App. 2a.

In affirming the preliminary injunction, the Sixth Circuit defended the "correctness of the *Yard-Man* inference," but acknowledged that it "has generated controversy" and "caused much consternation for employers." Pet. App. 11a-13a. Based in large part on *Yard-Man*, the Sixth Circuit approved the district court's reliance on the connection in the CBAs between eligibility for pensions and for retiree health care benefits, and explained that this overcame the general durational clauses in the CBAs. Pet. App. 14a-15a.

According to the Sixth Circuit, again citing *Yard-Man*, the language of the CBAs "does nothing to those employees who have already retired under the plan," because "[a]bsent specific durational language referring to retiree benefits themselves, . . . the general durational language says nothing about those retiree benefits." Pet. App. 15a. Relying on *Yard-Man* a third time, the court further supported its conclusion by noting that the duration clause for the insurance plan, like the duration clause for the pension plan, stated that it would "run concurrently with this [CBA] and is hereby made part of this Agreement." Pet. App. 16a-17a. Finally, the Sixth Circuit quoted *Yard-Man* and ruled that " 'the inclusion of specific durational limitations in other provisions . . . suggests that retiree benefits, not so specifically limited, were intended to survive.' " Pet. App. 17a (quoting 716 F.2d at 1481-82).

The Sixth Circuit also held that CNH America was the alter ego of J.I. Case and thus bore its labor law obligations. Pet. App. 28a-31a. In conducting this analysis, the court acknowledged that "[t]he alter ego doctrine was developed to prevent employers from evading obligations under the [National Labor Relations] Act merely by changing or altering their corporate form." Pet. App. 26a (quotation markes omitted). To determine alter ego status, the Sixth Circuit considered "whether the two enterprises have substantially identical management, business, purpose, operation, equipment, customers, supervision and ownership." Pet. App. 26a (quotation marks omitted). Under this test, no single element must be present for a court to deem two enterprises alter egos. Pet. App. 27a. The court also ruled that "common ownership or an intent to evade federal labor law obligations are *not necessary prerequisites* to a finding of alter ego status." Pet. App. 28a (quotation marks omitted, emphasis added). Instead, the court inquired into "whether there was a *bona fide* discontinuance and a true change of ownership . . . or merely a disguised

continuance of the old employer." Pet. App. 28a (quotation marks omitted). The Sixth Circuit held that CNH America was the alter ego of J.I. Case, despite the fact that CNH America has different ownership and no relationship with Tenneco or J.I. Case, and despite the fact that J.I. Case's obligations to respondents were fully and explicitly allocated to its owner, Tenneco (now El Paso), a solvent entity.

The Sixth Circuit denied CNH America's petition for rehearing en banc on May 9, 2006. Pet. App. 94a.

REASONS FOR GRANTING THE WRIT

The decision below provides an opportunity for this Court to resolve conflicts among the Circuits on two crucial questions of federal labor law: (1) whether it is proper to infer that health care benefits for union retirees are "vested" when the CBA creating them does not expressly state their duration; and (2) whether an employer can be deemed an alter ego of its predecessor, and thus be held liable for its predecessor's labor law obligations, after a reorganization or asset sale, even if the transaction expressly allocated those obligations to the predecessor's solvent parent and was neither fraudulent nor intended to evade those obligations. The conflict among the lower courts on these issues stands in stark contrast to the uniformity that Congress intended through the enactment of ERISA and the LMRA. Moreover, if not corrected, the Sixth Circuit's jurisprudence on these issues will hamper labor negotiations and inhibit the transfer of capital by companies with unionized work forces within the Sixth Circuit, if not nationwide.[3]

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[3] Demonstrating the nationwide import of the *Yard-Man* inference, it has been the subject of at least *five* subsequent petitions for certiorari, two of which were from Sixth Circuit decisions applying it. *See Powell Pressed Steel Co. v. Policy*, No. 85-1111 (U.S. filed Dec. 30, 1985) (6th Cir.); *Wheelabrator Corp. v. Bidlack*, No. 93-85 (U.S. filed July 15, 1993) (7th Cir.); *United Food Workers Int'l Union v. John Morrell &*

I. THE *YARD-MAN* INFERENCE HAS BEEN REJECTED BY EIGHT CIRCUITS, CONTRAVENES FEDERAL LABOR POLICY, IMPEDES LABOR NEGOTIATIONS, AND ENCOURAGES FORUM-SHOPPING.

The Sixth Circuit set forth its approach to collectively-bargained retiree welfare benefit plans in the seminal *Yard-Man* decision, 716 F.2d at 1479-82. In *Yard-Man*, the Court of Appeals interpreted "ambiguous" language in a CBA that dealt with the duration of welfare benefits for retirees. *Id.* The court first looked to the "explicit language of the [CBA] for clear manifestations of intent." *Id.* at 1479. When confronted with ambiguity in the express language, the court sensibly looked to "other words and phrases in the [CBA] for guidance." *Id.* at 1480. The court then went further, however, reasoning that: (a) because retiree benefits are permissive subjects of bargaining and are "typically understood as a form of delayed compensation," they presumably are not intended to be "left to the contingencies of future negotiations"; and (b) because retiree benefits are "status benefits," they "carry with them *an inference that they continue so long as the prerequisite status is maintained.*" *Id.* at 1482 (emphasis added).

The court attempted to minimize the significance of the inference, which it called a "contextual factor," by asserting that there was "already sufficient evidence of . . . intent in

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Co., No. 94-1803 (U.S. filed 1994) (8th Cir.); *BVR Liquidating, Inc. v. Int'l Union, UAW*, No. 99-1348 (U.S. filed Jan. 31, 2000) (6th Cir.); *Pabst Brewing Co. v. Rossetto*, No. 00-1095 (U.S. filed Dec. 27, 2000) (7th Cir.). CNH America submits that, given the mounting economic crisis caused by the escalating cost of health care benefits in the last several years (*see infra* Part I.E), this Court's review of the *Yard-Man* inference now would be timely and appropriate.

the language of the agreement itself." *Id.* at 1482. The court also acknowledged, however, that it deemed the inference a "persuasive consideration[]" that outweighed "contrary implications derived from a routine duration clause terminating the agreement generally." *Id.* at 1482-83. Indeed, one district court within the Sixth Circuit described the "inference of interminable benefits absent express language to the contrary" as "[t]he most important holding" of *Yard-Man*. *Golden v. Kelsey-Hayes Co.*, 845 F. Supp. 410, 413 (E.D. Mich. 1994) *aff'd* 73 F.3d 648, 656 (6th Cir.), *cert. denied*, 519 U.S. 807 (1996).[4]

A. Eight Circuits Have Rejected the *Yard-Man* Inference and Two Have Adopted it.

Ten Circuits (other than the Sixth Circuit) have considered the *Yard-Man* inference, with eight Circuits rejecting it and only two adopting it. As one court noted, the cases addressing the duration of retiree health benefits are "all over the lot." *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001).

The Third Circuit set forth the deficiencies of the *Yard-Man* inference in *UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999) (Alito, J., joining). The court explained that because Congress "explicitly exempted welfare benefits from ERISA's vesting requirements," it would be "illogical to infer an intent to vest welfare benefits in every situation where an employee is eligible to receive them on the day he retires." *Id.* at 140-41. *Skinner* also rejected the notion that an inference of vesting is necessary to protect retirees,

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[4] The Sixth Circuit has repeatedly applied the *Yard-Man* inference. *See, e.g., Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 916-17 (6th Cir. 2000); *Golden*, 73 F.3d at 656; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1297 (6th Cir. 1991); *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 616 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986).

because "those who fear that their unions will not bargain for continued benefits for retirees need only see to it that specific vesting language protecting those benefits is incorporated into [CBAs]." *Id.* at 141. Accordingly, *Skinner* held that benefits are "vested" only if the CBA contains "clear and express language" to that effect. *Id.* at 139.

The Seventh Circuit takes an approach precisely contrary to the one enunciated in *Yard-Man*, and *presumes* that benefits do *not* vest if the CBA is silent on the question of their duration. *See Rossetto*, 217 F.3d at 543-544 (presuming as a "default rule" that retiree benefits expire with the CBA conferring the benefits if it is silent as to their duration); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 607-09 (7th Cir.) (en banc) (establishing the presumption against vesting cited in *Rossetto*), *cert. denied*, 510 U.S. 909 (1993).

The First, Second, Fifth, Eighth, Ninth, and Eleventh Circuits have rejected the *Yard-Man* inference as well. *See Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 216-18 & n.16 (1st Cir. 2006) (rejecting inference of vesting based on *Yard-Man*); *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134-35 (2d Cir. 1999) (rejecting inference of vesting when agreement is silent on the issue of duration despite retirees' "extensive linguistic contortion[s]" in an attempt to "manufacture" ambiguity); *IAM v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997) (questioning and declining to apply the *Yard-Man* inference); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988) (rejecting *Yard-Man*'s "gratuitous" inference in favor of vested benefits), *cert. denied*, 489 U.S. 1051 (1989); *Bazzone v. Automotive Indus. Welfare Fund*, 1988 WL 58340, at *4-*5 (9th Cir. Oct. 4, 1988) (analyzing CBA through traditional means of contractual interpretation without inferences);

Stewart v. KHD Deutz Corp. of Am., 980 F.2d 698, 702 & n.3 (11th Cir. 1993) (same).[5]

At least three Circuits have also rejected a corollary to the *Yard-Man* inference that the Sixth Circuit developed in *Golden*, which stated that welfare benefits are vested because pension benefits are. *See* 73 F.3d at 656. *Contra Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 484 (7th Cir. 2006) ("Words that signify a lifetime commitment in a pension plan may not have the same effect in the context of health benefits."); *Puzis v. Masters Mates & Pilots Plans*, 1989 WL 57657, at *2 (9th Cir. May 22, 1989) ("Whatever [a provision linking death benefits to pensioner status] may imply about death benefits, it does not help in determining whether health care benefits were vested."); *Joyce*, 171 F.3d 134-35 (rejecting notion that provision of health care benefits to retirees receiving pensions permitted retiree to survive summary judgment on benefit duration).

Only the Fourth and the Tenth Circuits, without significant examination of the issue, appear to apply or endorse the *Yard-Man* inference. *See Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (using *Yard-Man* inference to construe CBA in favor of retirees and asserting that it provides a "more far-reaching understanding of the context in which retiree benefits arise."); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1514 (10th Cir. 1996) (supporting use of *Yard-Man* inference in construction of CBAs but *not* for agreements governed by ERISA).

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[5] The Eleventh Circuit had said earlier, in *dicta*, that it "fully concur[red]" with the outcome in *Yard-Man* in *United Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1504-05 (11th Cir. 1988), *cert. denied*, 489 U.S. 1096 (1989), but did not adopt the inference because the CBA in that case expressly provided for continuation of the benefits.

B. The *Yard-Man* Inference Strongly Influenced the Decision Below.

Although respondents may claim that the *Yard-Man* inference played little role in the decision below, its influence was pervasive. As an initial matter, the Sixth Circuit interpreted the CBAs at issue as "ambiguous" contracts. Pet. App. 14a-21a. Framing the CBA as "ambiguous" enabled the court to rely, even if *sub rosa*, on the principles underlying the *Yard-Man* inference. *See* 716 F.2d at 1479-80 ("ambiguity" triggers the inference).

Adopting respondents' argument, the Sixth Circuit observed that separate sections of the CBA used similar durational language for both pension benefits and health care benefits, and then concluded that the health benefits must be vested because the pension benefits are. Pet. App. 14a, 16a-17a.[6] To the contrary, the durational clause for pension benefits describes the amount of benefits available to employees who retire while the CBA is in effect, whereas the vesting of those pension benefits is mandated by ERISA, *not* the CBA. Retiree health care benefits, on the other hand, are *not* vested pursuant to ERISA. *See infra* Part I.D. For this reason, in Circuits that do not apply the *Yard-Man* inference, use of similar durational language for health care benefits and pension benefits does *not* mean that the health care benefits are vested in the absence of contractual language to this effect. *See, e.g.*, *Cherry*, 441 F.3d at 484; *Puzis*, 1989 WL 57657, at *2. Indeed, when welfare benefits are not collectively bargained, and thus *Yard-Man* does not apply, even the Sixth Circuit finds health care benefits vested only if the plan documents "express a clear and affirmative

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[6] In separate sections relating to insurance benefits and pension benefits, the CBA states that the respective plan "will run concurrently with this Agreement and is hereby made part of this Agreement." Pet. App. 4a.

intent to vest" them. *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660, 667-68 (6th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999). In essence, the Sixth Circuit below used the *Yard-Man* inference to reach a "vesting" result that ERISA would support for pension benefits, but that neither the LMRA nor ERISA supports for health care benefits.

The Sixth Circuit relied as well upon the silence in the CBAs regarding the duration of retiree health care benefits to conclude that they were vested. Pet. App. 15a-16a. In Circuits unbounded by *Yard-Man*, however, silence in CBAs does *not* lead to this conclusion. *See Skinner* 188 F.3d at 147 ("Silence on duration . . . may not be interpreted as an agreement by the company to vest retiree benefits in perpetuity."); *Joyce*, 171 F.3d at 135 ("We will not infer a binding obligation to vest benefits absent some language that itself reasonably supports that interpretation.").

Finally, the Sixth Circuit's treatment of extrinsic evidence reflects the *Yard-Man* inference. Pet. App. 20a-21a. Much of the extrinsic evidence provided by respondents and credited by the court consisted of "statements to show how particular persons understood the contracts *after* they had been signed" and did *not* reflect the views of the negotiators (Pet. App. 20a-21a), a crucial distinction in non-*Yard-Man* Circuits. *E.g., Bidlack*, 993 F.2d at 618 (discussing the difference between valuable extrinsic evidence from negotiators and non-valuable evidence from third parties). The Sixth Circuit also differs from non-*Yard-Man* Circuits on the weight to be given to evidence that retirees received the same health care benefits as active employees. This evidence suggests that the retiree benefits are *not* vested. *See Skinner*, 188 F.3d at 144.

C. This Court Has Recognized the Compelling Need For a Uniform Body of Federal Law Governing The Interpretation of CBAs.

The conflict among the Circuits over the *Yard-Man* inference is inconsistent with this Court's recognition that the realm of labor negotiations and the interpretation of CBAs "is peculiarly one that calls for uniform law." *Local 174*, 369 U.S. at 103 (quotation marks omitted). Indeed, "[t]he need for uniformity . . . is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote – the formation of the [CBA] and the private settlement of disputes under it." *UAW, AFL-CIO v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966). As a result, the Court seeks "to ensure uniform interpretation of [CBAs], and thus to promote the peaceable, consistent resolution of labor-management disputes." *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 404 (1988).

Among other reasons that uniformity is important, "[t]he possibility that individual contract terms might have different meanings . . . would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Local 174*, 369 U.S. at 103. With this uncertainty regarding contractual rights, "the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract." *Id.* Moreover, after an employer and a labor union reach an agreement, "the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation." *Id.* at 103-04. Accordingly, the threat of "conflicting legal concepts might substantially impede the parties' willingness to agree to [certain] contract

terms." *Id.* at 104. Thus, resolution of the conflict over the *Yard-Man* inference is important to preserve uniform application of federal labor laws.

D. The *Yard-Man* Inference Contravenes the Federal Labor Policy Underlying ERISA and the LMRA.

The *Yard-Man* inference also contradicts and frustrates the policy judgments underlying two principal labor law statutes – ERISA and the LMRA. As the Court has recognized, Congress expressly exempted welfare benefit plans from ERISA's vesting requirements. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 514 (1997) ("ERISA . . . specifically exempts 'employee welfare benefit plans' from its stringent vesting requirements."); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("Nor does ERISA establish any . . . vesting . . . requirements for welfare plans as it does for pension plans."). The reasoning behind this exemption was recounted by the Second Circuit:

> Automatic vesting was rejected because the costs of such plans are subject to fluctuating and unpredictable variables. Actuarial decisions concerning fixed annuities are based on fairly stable data, and vesting is appropriate. In contrast, medical insurance must take account of inflation, changes in medical practice and technology, and increases in the cost of treatment independent of inflation. These unstable variables prevent accurate predictions of future needs and costs.

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488, 492 (2d Cir. 1988). *See also Skinner*, 188 F.3d at 138 ("In rejecting the automatic vesting of welfare plans, Congress recognized the need for flexibility with respect to an employer's right to change medical plans."). These same considerations pertain equally to the health and welfare benefits conferred on union retirees by CBAs. As a result of the *Yard-Man* inference,

however, employers lose the flexibility of plan design and duration that was afforded by ERISA, thus constraining their ability to adapt these plans to changing circumstances.

The *Yard-Man* inference also interferes with congressional policy decisions underlying the LMRA. As the First Circuit explained in *Senior*, "the use of presumptions" favoring one side of collective bargaining "may also be inconsistent with the dynamics of bargaining set up under the National Labor Relations Act and the LMRA." 449 F.3d at 218 (internal citations omitted). The dearth of presumptions under the LMRA further suggests that the Sixth Circuit went too far with the *Yard-Man* inference. Congress could have created a statutory form of the inference – as ERISA has for pension benefits – but chose not to do so. *Id.*[7]

E. The *Yard-Man* Inference Has Pervasively Detrimental Effects on Labor Negotiations and The Negotiating Parties.

The *Yard-Man* inference also warrants review by this Court because, by eroding the contractual certainty of CBAs and prompting forum-shopping by labor unions, it hampers labor negotiations and causes externalities that are contrary to public policy in at least five respects.

First, the *Yard-Man* inference operates independently of the intent and incentives of the parties to a CBA, which normally would be the focus of the court's inquiry. As the First Circuit acknowledged in *Senior*, judicial inferences unduly interfere with the "correct interpretation, under

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[7] Although the *Yard-Man* decision asserts that the inference is not a "presumption" (716 F.2d at 1482), its influence upon the decision below demonstrates that this is a distinction without a difference. The Third Circuit described the *Yard-Man* inference as a presumption in *Skinner*, 188 F.3d at 139.

normal LMRA rules, of the understanding reached by the parties." 449 F.3d at 218. Further, in the normal course of negotiation, ample incentives exist for unions to bargain for the continuation of benefits for future as well as existing retirees. *See Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207 (1991) (explaining that parties can provide "in explicit terms" for the continuation of benefits after the agreement's expiration); *Skinner*, 188 F.3d at 141 (explaining that unions can bargain for specific vesting language in their agreements); *Bidlack*, 993 F.2d at 609 (reasoning that active employees have every incentive to insist on vesting language). Because retiree health care benefits are permissive rather than mandatory subjects of bargaining, however, the *Yard-Man* inference produces the opposite incentive: unions are better off by *refusing* to bargain for clear language. Silence or ambiguity in the CBA gives rise to the inference that benefits are vested for life.

Second, the *Yard-Man* inference does not account for the rapidly escalating cost to employers of health care benefits, which was the very reason that Congress *refrained* from deeming employee welfare benefits "vested" under ERISA. *See Moore*, 856 F.2d at 492. "[I]f an employer is locked into paying compensation costs that the productivity of their workers cannot support, jobs will go elsewhere." United States General Accounting Office, *Employee Compensation: Employer Spending on Benefits Has Grown Faster Than Wages, Due Largely to Rising Costs for Health Insurance and Retirement Benefits* 25 (Feb. 2006) (GAO-06-285) (noting concerns of businesses regarding their ability to continue funding health care benefits). The same GAO study concluded that the rising cost of retiree medical insurance will cause employers to meet their labor needs with workers requiring fewer benefits, such as contingent or overseas workers. *Id.* at 26. Threatened with the loss of jobs over such legacy costs, active employees are all the more susceptible to receiving lower levels of benefits.

Third, on a related note, the *Yard-Man* inference creates uncertainty for employers who have in good faith negotiated changes to benefits, coverages, premium contributions, and funding mechanisms. If a court later "infers" that the health care benefits for current retirees were vested, and thus not subject to reduction even through collective bargaining, any negotiated limits will be unenforceable.

Fourth, as has been widely reported, major companies in various industries in the United States, including several headquartered within the Sixth Circuit, have been forced by legacy costs to seek bankruptcy protection as a means to restore some of the flexibility that Congress intended for employers to have in amending their welfare benefits. *See Delphi, Unions and GM Show Progress*, Wall St. J., June 10, 2006 (describing Delphi's request for bankruptcy court to approve rescission of contracts with unions to reduce benefit costs); *Wielding the Ax*, Wall St. J., Oct. 18, 2005 (reporting on agreement between UAW and General Motors to cut retiree health care benefits, and citing experts' opinion that "GM might even be forced into bankruptcy by its mounting legacy costs"). This situation is exacerbated by the *Yard-Man* inference.[8]

Indeed, rapidly increasing legacy costs also deprive employers of capital required for research and development, updated equipment and technology, mergers and acquisitions, and general global competitiveness. The problems of "[s]kyrocketing medical costs, increasing retiree populations . . . financial statement accountability, and imperfect opportunities for tax-favored prefunding make

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[8] Tellingly, one academic study determined that "[r]etiree medical benefits first exploded onto the legal scene around 1983," the year in which *Yard-Man* was decided. Michael S. Melbinger & Marianne W. Culver, *The Battle of the Rust Belt: Employers' Rights to Modify the Medical Benefits of Retirees*, 5 DePaul Bus. L.J. 139, 140 (1992).

reducing medical costs for retirees a critical issue for many employers" and render controlling retiree medical costs "one of many cost-cutting measures essential to survival." *Battle of the Rust Belt*, 5 DePaul Bus. L.J. at 161-62. Accordingly, the need for this Court's involvement in these issues, presented squarely by this case, has only grown. *See Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 782-83 (7th Cir. 2005) (recognizing that "[t]oday's employment market is heavily impacted by the abruptly rising cost of health care, and the ensuing increases in health insurance premiums.").

Finally, the *Yard-Man* inference encourages retirees to bring suit over health care benefit disputes in the Sixth Circuit even if they have little or no connection to that geographical area. The liberal venue provisions of the LMRA and ERISA permit and thus all but ensure such forum-shopping. *See* LMRA § 301(a), 29 U.S.C. § 185(a) (authorizing actions in any venue having personal jurisdiction over the parties); ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2) (authorizing actions in any venue where a defendant "may be found"). In this case, for example, respondents filed their suit in the Eastern District of Michigan, even though they (or their spouses) worked for J.I. Case within the Fifth, Seventh, and Eighth Circuits, and even though none of the Case employer entities have ever had operations within the Sixth Circuit. This blatant forum-shopping subjects employers with nationwide operations "to multiple and inconsistent rules," thus increasing costs, uncertainty, and all of the associated ills described above. *Bidlack*, 993 F.2d at 620 (Easterbrook, J., dissenting).

II. THE DECISION BELOW ALSO IMPLICATES A SQUARE CONFLICT AMONG THE CIRCUITS REGARDING THE "ALTER EGO" DOCTRINE.

A. Six Circuits Require Fraud or Intent To Evade Labor Obligations in Order To Deem a Company An Alter Ego, Five Do Not, and One Does Not Expressly Consider the Issue.

As noted above, the Sixth Circuit determined that CNH America was the alter ego, and thus bore the liabilities, of J.I. Case, and the court ruled that "an intent to evade federal labor law obligations" is *not* a "necessary prerequisite[] to a finding of alter ego status." Pet. App. 28a. (quotation marks omitted) As shown, all liabilities in question were fully allocated to Tenneco and its successor, El Paso, and these companies have consistently paid all of respondents' *below-cap* health care costs. The decision below has created the anomalous situation in which El Paso is primarily liable for *below-cap* costs, whereas, due to *Yard-Man* and misapplication of the alter ego doctrine, CNH America is liable (with a contractual right to indemnification) for *above-cap* costs. Indeed, respondents claimed that *both* CNH America and El Paso were liable for payment of their above-cap health care benefits.

This aspect of the Sixth Circuit's decision implicates another conflict among the Circuits, six of which *do* require fraud or intent to evade federal labor law obligations for an alter ego determination. In contrast, five Circuits (including the Sixth) consider these elements to be merely equal factors among many, and one Circuit considers only whether the corporation stands to reap a benefit from reorganization. These disparate analyses in an important area of federal labor law merit review by this Court.

1. The Fifth, Seventh, Eight, Ninth, Tenth, and Eleventh Circuits Require Disguised Continuance, Fraud, or Evasion of Labor Law Obligations.

Six Circuits will deem a company an alter ego of its predecessor *only* if it can be shown that the creation of the new entity was motivated by fraud or an intent to evade the predecessor's labor law obligations. The Fifth Circuit looks first to "whether the two enterprises have substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership," and next "must gauge whether there was an unlawful motive . . . determining whether there was a disguised continuance or attempt to avoid the obligations of [a CBA] through a sham transaction or technical change in operations." *J. Vallery Elec., Inc. v. NLRB*, 337 F.3d 446, 451 (5th Cir. 2003) (quotation marks omitted).

Similarly, the Seventh Circuit has ruled that "[e]ssential to the application of the alter-ego doctrine is a finding of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement, such as a sham transfer of assets." *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Trans., Inc.*, 85 F.3d 1282, 1288 (7th Cir. 1996). Indeed, the Seventh Circuit deems "*unlawful* motive or intent" to be "*critical inquiries* in an alter-ego analysis." *Id.* (emphasis added).

The Eighth Circuit likewise has held that "the legal fiction of the separate corporate entity may be rejected in the case of a corporation that (1) is controlled by another to the extent that it has independent existence in form only and (2) is used as a subterfuge . . . to *justify wrong*, or to *perpetuate a fraud*." *Greater Kansas City Laborers Pension Fund v. Superior Gen. Contractors, Inc.*, 104 F.3d 1050, 1055 (8th Cir. 1997) (emphasis added); *see also Crest Tankers, Inc. v. Nat'l Maritime Union.*, 796 F.2d 234, 237

(8th Cir. 1986) ("A critical part of the inquiry into alter ego status . . . is whether the employers acted out of anti-union sentiment or to avoid a labor contract.") (quotation marks omitted).

The Ninth Circuit also begins its alter ego analysis with the typical requirements of common ownership and management, interrelated operations, and centralized control of labor relations, but requires further that the new company is "being used 'in a sham effort to avoid collective bargaining obligations.' " *UA Local 343 of the United Ass'n of Journeymen of the Plumbing & Pipefitting Indus. v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1470-73 (9th Cir.), *cert. denied*, 516 U.S. 912 (1995) (quotation marks omitted).

The Tenth Circuit examines not only whether the corporate entities respected their separate identities, but also whether "adherence to the corporate fiction [would] sanction a fraud, promote injustice, or lead to an evasion of legal obligations." *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1052 (10th Cir. 1993). Indeed, the Tenth Circuit expressly "require[s] an element of unfairness, injustice, fraud, or other inequitable conduct" and "emphasize[s] that the showing of inequity . . . must flow from the misuse of the corporate form." *Id.* at 1052-53.

Finally, the Eleventh Circuit considers the dominion and control one entity has over another, and a finding of alter ego status turns on whether some act of fraud or wrongful conduct occurred as a result of the new corporate form. *See United Steelworkers*, 855 F.2d at 1505-06.

2. The First, Second, Third, and D.C. Circuits Treat Fraud or Evasion of Labor Law Obligations as Equal Factors Among Many.

Four other Circuits (plus the Sixth Circuit) consider the presence of fraud or evasion of labor law obligations as one co-equal factor in the alter ego analysis, rather than a

prerequisite. Thus, the First Circuit considers "anti-union animus," among other elements, but "there is no rule that wrongful motive is an essential element of a finding of alter ego status." *Mass. Carpenters Cent. Collection Agency v. Belmont Concrete Corp.*, 139 F.3d 304, 308 (1st Cir. 1998). Similarly, in the Second Circuit, although "[e]vidence that a desire to avoid union obligations motivated the formation of a corporation may also be relevant to a finding of alter ego status," a finding of "anti-union motivation is [not] necessary." *NLRB v. G & T Terminal Packaging Co.*, 246 F.3d 103, 117-18 (2d Cir. 2001) (quotation marks omitted). This test is nearly verbatim identical to the one adopted by the Third Circuit in *Stardyne, Inc. v. NLRB*, 41 F.3d 141 (3rd Cir. 1994), which held that intent to evade labor obligations was to be considered, but was not necessary to find alter ego status. *Id.* at 146-50. Finally, the District of Columbia Circuit also has held that although "[a]nti-union animus may be a reason one entity should be deemed the alter ego of another . . . the absence of anti-union animus certainly does not establish that two entities are not alter egos." *Flynn v. R.C. Tile*, 353 F.3d 953, 960 (D.C. Cir. 2004).

3. The Fourth Circuit Does Not Explicitly Consider Fraud or Evasion of Labor Law Obligations in its Alter Ego Analysis.

The Fourth Circuit applies a wholly different alter ego test. *See Alkire v. NLRB*, 716 F.2d 1014, 1020 (4th Cir. 1983). First, the Fourth Circuit inquires "whether substantially the same entity controls both the old and new employer." *Id.* If so, the court then examines "whether the transfer resulted in an expected or reasonably foreseeable benefit to the old employer related to the elimination of its labor obligations." *Id.* The court has specifically distinguished this test from those described above, noting that "[l]inking employer motivation for the transfer of its business to obtaining a future benefit represents a broader

standard than does requiring antiunion animus or intent to evade labor obligations." *Id.* (quotation marks omitted) Fraud and the intent to avoid labor obligations do not appear pertinent to the Fourth Circuit's analysis. Under this test, CNH America would *not* be deemed an alter ego of J.I. Case.

B. This Case Provides an Opportunity for the Court To Create Uniformity Among the Circuits and To Require an Alter Ego Analysis That Comports With the Precedents of the Court.

This Court has observed that alter ego status generally "involve[s] a mere technical change in the structure or identity of the employing entity, *frequently to avoid the effect of the labor laws*, without any substantial change in its ownership or management." *Howard Johnson*, 417 U.S. at 260 n.5 (emphasis added). "In these circumstances," the Court continued, "the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor." *Id.* The conclusion that evasion of labor laws is a necessary aspect of alter ego status comports with the rulings of six Circuits discussed in Part II.A.1.

Moreover, in *Howard Johnson* the predecessor companies "continue[d] as viable entities with substantial retained assets," thus ensuring that the union had "a realistic remedy to enforce their contractual obligations." 417 U.S. at 257. Accordingly, the Court held that the successor business was *not* responsible for obligations of the predecessor companies. *Id.* at 264-65. The same facts apply here. Respondents are capable of enforcing their purported contractual rights – and have done so – against El Paso, because it remains a profitable company with significant assets. The 1994 reorganization did *not* present the hypothetical situation that the Court addressed in *Howard Johnson*, in which the predecessor entity ceased to exist and the union had "no means to enforce the obligations

voluntarily undertaken by the merged corporation." *Id.* at 257. By the reasoning of *Howard Johnson*, application of the alter ego doctrine to CNH America was unwarranted.

In addition, this Court has recognized the potentially onerous consequences of an alter ego determination, thus suggesting that the more stringent plurality test is the correct one. In *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), the Court acknowledged that holding a new employer bound to the substantive terms of its predecessor's CBA could create "serious inequities." *Id.* at 287. Indeed, "[a] potential employer may be willing to take over a moribund business only if he can make changes" that might be inconsistent with the old CBA. *Id.* at 287-88. "Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." *Id.* at 288. Accordingly, as this Court recognized, to burden new employers and companies with the liabilities of their predecessors – without imposing stringent requirements, such as an intent to evade labor obligations – would unduly hinder corporate reorganizations and asset sales. The Court also acknowledged in *Burns* that alter ego status does *not* "ensue as a matter of law from the mere fact that an employer is doing the same work in the same place with the same employees as [its] predecessor." *Id.* at 291. This observation that more than operational "identity" must be required for an alter ego determination further underscores the appropriateness of the six-Circuit rule.

Review by this Court would also create uniformity among the Circuits on an important issue of federal labor law and thus would inhibit forum-shopping by litigants seeking to benefit from their preferred alter ago standard. It is unacceptable "to permit the rights enjoyed by the new employer in a successorship context to depend upon the

forum in which the union presses its claims." *Howard Johnson Co.*, 417 U.S. at 256. Yet this is precisely the situation confronting employers in labor law litigation today.

Uniform application of the alter ego doctrine would create predictability and provide transacting parties with greater certainty regarding the liabilities that will be passed on to a business successor, thus helping to ensure that reorganizations and asset sales – such as the one affecting Tenneco and J.I. Case – are conducted on economically rational terms. Uniformity would also aid the collective bargaining process, by permitting more accurate allocations of responsibilities between labor unions and employers that anticipate a reorganization or an asset sale. Finally, as discussed above, the importance of labor negotiations "peculiarly" demands uniformity in the law affecting collective bargaining. *Local 174*, 369 U.S. at 103.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

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AUGUST 3, 2006